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ABSTRACT

A tort is an actionable wrong, other than breach of contract, that the courts will recognize and intervene to equalize. There are three questions the court will ask: Did someone owe someone else a duty? Was there a breach of duty owed? Was the breach the proximate cause of the plaintiff's injury? The grounds for injury actions may be classified as intentional acts, negligence, or strict liability, which involves being liable for an injury although one is not actually at fault. There are six categories of sports injury causes: (1) defective equipment, (2) lack of supervision or lack of adequate supervision, (3) absence of rules and regulations for establishing order and maintaining control of an activity, (4) conditions of the premises leading to an injury, (5) treatment or lack of treatment that makes an injury worse, and (6) miscellaneous factors, such as coaching error. The most common defenses include arguments that the accident was unavoidable, that the plaintiff contributed to his or her accident, that the plaintiff assumed risk when he or she chose to play the sport, and that the defendant is included under governmental or charitable immunity. (Author/IRT)

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SPORTS LAW:

TORT LIABILITY OF THE COLLEGE AND UNIVERSITY ATHLETIC DEPARTMENT ADMINISTRATOR

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Prepared for presentation at the Conference of Western College Men's Physical Education Society held at Reno, Nevada, October 17-19, 1979

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Introduction

It is indeed a privilege to meet with you members of the Western College Men's Physical Education Society, who are on the firing line, and who are, perhaps without realizing it, shaping the sports law that will continue to govern and control your field for many years to come. We are in the midst of an explosion in the law governing sports. Your generation of sports administrators is reaping the whirlwind sown by the civil rights movement in this country, which has resulted in our living under judge-made rather than statutory law, minority rather than majority law, litigation instead of legislation. Within the past seven years, the volume of court cases involving physical education and sports and recreation has doubled and redoubled, and is still on the increase. You are right to include in your program at this conference an examination of the cases together with the implications for managers and administrators of these enterprises, and I commend you on your foresight in this respect.

The world watched with fascination this past week as the Pittsburgh Pirates came from behind in the World Series to defeat the Baltimore Orioles. From the numbers who watched, you may have concluded that baseball is our national pasttime. You would be wrong. The events that hold the rapt attention of more Americans than any other are related to our belief that nothing is settled till it has had its day in court. We live in an Age of Litigation. It fascinates us--life and death, fortune and misfortune hang in the balance as we cheer a first and ten on the one yard line for this lawyer or that. We cheer the white hats, boo the black. Our complete absorption by court-watching caused a recent wag to suggest that the

national motto should be changed from In God We Trust to Sue the Bastards. Let's face it--we are a litigious people, and far more of us watch the courts than watch sports during any given month of the year.

Americans understand competition and glory in it. Will and Ariel Durant wrote that this is the first biological lesson of history--competition. "Competition is not only the life of trade," they asserted, "it is the trade of life--peaceful when food abounds, violent when the mouths outrun the food. Animals eat one another without qualm; civilized men consume one another by due process of law."[1]

Inequality, according to the Durant's, is not only natural and inborn, it grows with the complexity of a civilization. To equalize our lives, we Americans have taken to relying on our modern oracles, the judges, referees, umpires, and other arbitrators our complex society requires. Moral codes are not enough--we must clarify the human condition once and for all by bringing our problems out into the open and settling them in the arena of due process, the courtrooms of the nation. Everyone is expected to know the law, but the administrator must know the law or fail to understand the rules by which the game of life is presently being played. Since men devour each other by dur process of law, you may be tomorrow's bill of fare.

Let me qualify my bias. I have been a teacher, principal and superin-

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[1]Will and Ariel Durant, The Lessons of History, New York: Simon and Schuster, 1968, p. 19.

tendent and taught these subjects at the college level for several years. If a central lesson has come out of this experience, it has been that we are now living under a model for change that has these component parts.

The Model for Change

First, an individual or a minority class claims denial of a right guaranteed by the Constitution. A court is sympathetic to their complaint, and decides in their favor. Time passes, during which the right so won is digested into the thinking of the majority, after which it becomes majority law via enactment by the legislative branch of the government. A good example is Brown v. Board of Education, in which the U.S. Supreme Court held in 1954 that separate but equal facilities for the races are inherently unequal and a denial of equal protection of the laws. Not until 1964, in the Civil Rights Act of 1964, did the concept become majoritarian law when the Congress acted to make it the law of the land.

The net effect has been that one must read the cases rather than the legislative code to understand at any one moment in time what your rights and liabilities may be. Thus, it is appropriate that you should stop now and then to look at the events in your field and discern the trends to keep a steady hand on the tiller. My function, therefore, is to bring you up to date on developments in sports law; if time permits, there will be a question and answer period at the close of these remarks.

Sports Are Big Business

Given an affluent society that has money and time to spend, and Madison

Avenue's advice on how to spend them, we should not be surprised to learn that athletic sports and recreational activities now rank at or near the top of our nation's multi-billion dollar industries. Along with mushrooming growth comes pressure, and pressure brings in to play the law. It should be no surprise therefore to learn that sports law has grown from a mere nothing ten years ago to become one of the most voluminous and fascinating areas of the law today. Given a generous supply of lawyers, a litigious bent, and huge amounts of money and prestige to be gained, we have developed this area of the law with much the same speed as today's runners are making an attack on the record for the mile. And this is only the beginning.

The Body of Law

Seven years ago, aware of the need, two attorneys decided to write a book on sports law.[2] Although they little realized it at the time, they were taking the tide at its flood. In 1972, for example, player unions were only in their infancy, the anti-trust exemption for baseball had just been confirmed by the courts, and the reserve clause seemed invulnerable to legal attack. In other sports, traditional player restraints were intact and there was a popular belief that these devices were not subject to litigation. In the tax area, professional sports franchises were thought

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[2]John Weistart, Professor of Law, Duke University and Cym Lowell, a member of the Atlanta bar. Their book, The Law of Sports, was published by Bobbs-Merrill of Indianapolis in 1979.

of as attractive tax shelters, not as assets. In amateur sports, high school athletic associations were firmly in charge of such issues as eligibility, athlete conduct and participation rights. At the collegiate level, suits against the NCAA were a rarity, and the meager precedents in the law did not yield a coherent theory on the legal standing of the NCAA. Indeed, at that time, in 1972, the authors wrote that any suggestion that actions of the NCAA "might be reviewable under the antitrust laws seemed truly fanciful."[3]

Well, things changed almost overnight. You saw it happen; you can relate the rest of the story. What they thought would be a small book turned out to be almost 1,200 pages in length. Due to rapid changes during the writing, the authors could not stop and say, "This is the final word on the subject." Instead, they battled valiantly to keep up with changes, adding new chapters as they went--collective bargaining in sports, enforcement of professional sports contracts, the antitrust aspects of sports activities, and the new federal income tax on sports events. When they added the ordinary injury cases, which had remained largely stable in principle while exploding in volume and scope, they produced the first, but certainly not the last, comprehensive volume on the subject of sports law. I recommend it to you as a guide in directing your work and in keeping a low profile as an administrator in the physical education field.

The Law of Torts

It would be enticing to pursue these new developments in sports law

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[3] Ibid., p. xvii

if time allowed. However, your committee has asked me to confine my remarks to tort law, that is, the law of injury and to the changes that have taken place therein. I am assuming that this area of the law is not all that unfamiliar. The issues that are raised in sports injury cases are likely to fall within a very narrow range of applicable legal principles. While these can readily be enumerated, it is quite another matter to apply the principles to the broad field of sports and arrive at any rule of thumb to avoid needless litigation and keep a low liability profile. Nothing in the past seven years in this area should be new to you, so my task is to recount the basic principles once again.

A tort is an actionable wrong other than breach of contract which the courts will recognize and intervene to equalize. There are three questions the court will ask: 1) Did someone owe someone else a duty? 2) Was there a breach of the duty owed? and 3) Was the breach the proximate cause of the plaintiff's injury? We are assuming, of course, that an injury has in fact occurred, which is the threshold question in any event.

These principles of tort law derive from our English ancestors in the law and go all the way back to Robin Hood. They are based on two prior questions: 1)Who was at fault? and 2) Who must bear the brunt of the injury? Assuming that the plaintiff is able to show he has indeed suffered a bona fide loss or injury, it then becomes the task of the jury, on instructions from the court, to decide whether the defendant owed the plaintiff a duty, whether and in what way that duty was breached, and whether from that breach flowed the plaintiff's loss. The judge deals with points of law, the jury

with matters of fact. More specifically, the jury is faced with deciding, as a matter of fact, whether the defendant's standard of care was equal to that of the average prudent person acting in the same circumstances. If he acted as the normal person would have acted, he is free from negligence; if he did not act thusly, he may be held to account for his lower standard of care.

So much for the general principles underlying tort law. The grounds for injury actions may be classified in terms of positivism or negativism from the standpoint of the defendant. First, there may be acts that are intentional and that lead to injury; second, there may be acts of omission, which is defined as the failure to act seasonally; and third, there is strict liability, which includes product liability and goes back on the supplier for relief. Intentional acts are doing something from which an injury flows, negligence (acts of omission) relates to failing to do something which causes an injury to another, and strict liability involves being liable for an injury although not actually at fault. Let us look at cases to illustrate each of these kinds of grounds applying the three-way duty-breach-proximate cause test mentioned earlier to show how it works.

Cases in Point

Student A, a high school football player, was, according to his attorneys, "induced, persuaded, and coerced" to play in a game even though he had a previous injury of which the coach was aware. He sought damages. In ruling for the student and against the coach, the court found the coach owed the player a duty, that he had breached his

duty to the boy, and that the further injury sustained by him was proximately caused by the intentional act of the coach in persuading the boy to play. The Supreme Court of Washington upheld recovery of damages awarded by the jury quoting with approval from an earlier case in the same state. "If he (the coach) knew it (that the player was playing injured), it was negligence to permit it; if he did not know it, it was negligence not to have observed it." On either count, the coach was held to have breached his duty to the player, and his intentional act was the proximate cause of the injury.[4]

Just to make this legal principle more confusing, the courts have handed down many cases on the other side of the ledger: that one who goes out for a sport assumes the normal risks associated with that activity, unless the coach's acts were so wilfull that they amount to gross negligence. One is never certain in such cases what the mood of the jury may be in the presence of an injured player in the courtroom.[5]

Intentional interference with the rights of another that may result in injury do not depend on enmity, antagonism, maliciousness or collusion so much as on the principle that the defendant's acts must be judged on the norm of what the average, prudent person of ordinary intelligence might have done under the circumstances. While easy to state, the principle is not always easy to apply in practice, since there are other factors operating when the court and the jury make their decisions.

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[4]Morris v. Union High School Dist. A, King Co., 294 P. 998, Wash. 1931

[5]Hale v. Davies, 70 S.E.2d 923, Ga. 1952

Student B, a female college student who had considerable athletic talent, was encouraged by her college to sign up for a self-defense course taught by a policeman-instructor. Students were not warned that there might be any danger involved in taking the course, and so she was unprepared for what happened. The instructor, in demonstrating the hip throw, a judo hold included in the course, threw her in such a way that her back hit partly on the mat and partly on the gym floor. She sustained a permanent injury and could do nothing more strenuous than walking. Her injury was diagnozed as an intervertrebal disc. The judge allowed the jury to consider loss of earnings in making the settlement of $150,000 against the college.[6]

The two cases illustrate acts of commission--what about acts of omission (negligence)? Andy Lowe was a football player at Texas Tech University. He played with an injured knee and was further injured, he claimed, by failure of the university staff to protect him adequately against further injury. The court found that he was entitled to damages despite Texas' tort immunity statute because of a proviso in the law permitting recovery where injury was due to the use of equipment.[7] The question was whether Lowe suffered an injury due to "the use of equipment," or more specifically, whether failing to tape his knee was an exception to the tort immunity statute then in force. The knee had been taped when it was first injured, but not at the time it was injured further. The court negligence on the part of the university involving, in the words of the controlling statute, "the use of tangible property" for which he could recover.

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[6]Wells v. Colorado College, 478 F.2d 158, Colo. 1978 (the award was held not to be exorbitant under the circumstances).

[7]Lowe v. Texas Tech University, 540 S.W.2d 297, Tex. 1976

The reasoning of the court was that special protective devices are an integral part of the regular uniform, using in part these words:

> . . . .A football uniform is composed of various items of individual equipment and the protective equipment furnished players may vary with the individual because of his physical characteristics and the hazards of the particular position he plays. Football uniforms are designed to protect players from injury and players who have suffered a previous injury are commonly furnished special protective devices and equipment. Both the standard and specially designed protective devices are integral parts of the football uniform, e. g., special taping or knee braces furnished a player with an injured knee are as much a part of his uniform as his helmet, or shoulder pads, or whatever. So we hold that Lowe's allegations of a negligent failure to furnish him proper protective items of personal property, to be used as a part of the uniform furnished him, bring his case within the statutory waiver of immunity arising from some condition or some use of personal property.[8]

Awards in injury cases can run into the millions of dollars and consume up to ten years or more for final settlement. In October, 1970, an airplane chartered by the Wichita State University to transport its football team to a game crashed in the mountains of Colorado. Negotiations are still in progress relating to damages in that case. Survivors and friends of the players claimed the university was negligent. The Supreme Court of Kansas held that the physical education department (a corporation) was an agent of the university and that its athletic director, as an officer of the corporation, had implied power and authority to bind his principal, the university, when he executed an aviation services agreement. Under the law of agency, failure or neglect of officers or agents, said the court, renders the principal liable for damages resulting therefrom, even though the state supreme court had abrogated governmental immunity within the state

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[6]Ibid.

and it had been reimposed by the legislature by statute.[7]

The Lowe and Wichita State University cases illustrate the principle of law that says that where someone owes another a duty and fails to do something that the reasonable person would do and an injury results, that someone can be held liable to the injured party or his heirs in tort. In this category, unlike the first, failure to do something in season amounts to negligence. Most of the present-day sports injury tort action cases fall into this category.

The third grounds for damages in tort involves what is called "strict" liability, in which someone may be liable for an injury even though not actually at fault in a personal sense. An example arose in Massachusetts, where a college hockey player sustained a fractured skull when he used his helmeted head to block a direct shot on goal by an opposing player. The puck, traveling at a high rate of s peed, wedged itself into a crease in the three-piece headgear, causing the injury. The injured player sued the manufacturer of the headgear, the distributor and the school's coach which had provided the equipment. The court found the evidence sufficient to support a jury finding that the manufacturer negligently designed the helmet, and that the coach also assumed a liability for supplying the defective equipment to the player.[8] The court, however, left up to the jury the question as to whether the plaintiff hockey player assumed the risk without complaining about the

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[7]Brown v. Wichita State University, 547 P.2d 1015, Kans. 1976

[8]Everett v. Bucky Warren, Inc., 380 N.E.2d 653, Mass. 1978

helmet's design or refusing to wear it in a game. Under the doctrine of strict liability, anyone who makes a product that is used in its normal way and injury occurs may be held liable only if the plaintiff can prove that he used the equipment as it was meant to be used, but that some defect in its design or manufacture was the proximate cause of the injury.

Another product liability case arose in California, where a student was injured during a fencing meet as a member of his college team. His opponent was using a sabre that was purchased from one of two possible suppliers. When the sabre penetrated the student's mask and injured his eye, he sued the suppliers of both the sabre and the mask. The court pointed out that there was a significant difference in the legal questions involved in the suit. In the case of the sabre, the evidence established that one, but not both of the two suppliers had produced a defective product, but the evidence did not disclose which one. Because he could not pin the duty on a specific defendant, the student could not recover from the sabre makers. As to the mask, expert testimony at trial revealed that no mask could be made that would guarantee absolute protection against a defective blade. Since the player could not establish that the mask was of faulty design, or that the faulty design had caused his injury, he failed to collect damages from any of the product manufacturers or from the coach who had selected the allegedly faulty equipment.[9]

Physical Education Administrators

Phys ed department administrators may be held personally liable where it is established that they owed a duty directly to some participant, a spectator or other person on the premises. By far the largest number of

[9] Garcia v. Joseph Vince Co., 148 Cal.Rptr. 843, Cal. 1978

to participants. Where the administrator has fulfilled the duty owed by assigning a member of the staff to supervise an activity, or has otherwise discharged the duty in such a way as to move out of the direct line of liability, he cannot be held personally liable. Thus, a coach, trainer, doctor, instructor, or other staff member may be held liable where injury occurs rather than the administrator's being held liable.

The classic case on this point is DeGooyer v. Harkness,[10] in which the parents of a South Dakota sued both the superintendent and the coach for the wrongful death of their son during a lettermen's initiation ceremony. The superintendent was held not liable because he had met his duty to the boy by placing a legally qualified and competent teacher in charge of the activity.

Administrators are generally not held liable where injuries occur due to a spectator's choice of a seat at a sporting event. Where a baseball fan was injured by a foul ball that curved around a protective screen, the court held the accident was unavoidable, and that the spectator assumed a risk when he bought a ticket and took a seat in a place that was not totally safe from the foul balls which are a normal part of the game.[11]

Causes of Sporting Injuries

There are six categories related to sports injuries causes, as follows: 1) defective equipment; 2) lack of supervision of an activity, or at least lack of what can be considered legally adequate supervision; 3) absence of rules and regulations for establishing and maintaining control of an activity;

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[10] 13 N.W.2d 815, S.Dak. 1944

[11] Curtis v. Portland Baseball Club, 279 P. 277, Ore. 1929

4) conditions of the premises leading to injury; 5) treatment or lack of treatment which makes an injury worse; and 6) miscellaneous factors, such as coaching error, and the like. Each of these causes of sports injuries deserves examination in turn.

Defective equipment. We have seen examples of product liability due to defective equipment. In addition to strict liability, as such liability is known, there are two other subclasses of equipment cases: 1) negligence liability, such as where a member of the staff may be negligent; and 2) warranty liability, in which an expressed or implied warranty of a product is involved. While all three classes may overlap somewhat, they all rest on the general principle that one who furnishes, supplies or selects equipment for another owes that other a duty, but will be held liable in damages only in these three instances : 1) if he had reason to know that the equipment was dangerous for the use for which is was supplied; 2) if he had no reason to believe that those who use the equipment will realize its dangerous condition; and 3) if he fails to exercise reasonable care to inform the user of the equipment's condition or of the facts which make it likely to be dangerous.

For example, a high school football player was injured. He complained that his injury was due to defective equipment. Players were free to select equipment from a table in the gym. When he selected a headgear that was loose for him, as well as his shoulder pads, he could not later complain that the coach was at fault, since he was free to choose another uniform and he did not at any time mention to the manager or the coach that he found fault with his equipment. The coach was held not liable, and the player was ruled to have contributed to his own injury by his selection of the equipment.[12]

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[12]Vendrell v. School Dist. No. 26C, Malheur Co., 376 P.2d 406, Ore. 1962

In this case, the equipment was furnished free to players, but there may be a more stringent duty of care where equipment is either rented or leased if it can be shown that the lessor knew or should have known that an injury was likely to occur under the circumstances. Part of the duty may be fulfilled by including written instructions on proper use of the equipment, or warnings about possible dangers. Cautioning the users to use the equipment only in the way it was intended to be used may also help alleviate the liability. Thus, where a flighty horse was provided for a beginner in riding class, or where ski boots and other equipment were rented, users were ruled to have been entitled to warnings about the known hazards associated with these particular uses of equipment. Failure to notify the user may clearly point to breach of duty on the part of suppliers of the equipment.[13]

A manufacturer's product, say the courts, "must not be a trap for the unwary." Manufacturers must warn of a possible danger to by-standers who may come into contact with a machine or product. Where a baseball pitching machine, which did not contain operating instructions or warnings, was stored in the gym, and the pitching arm came down and injured a sweeper boy, the court held the distributor liable even though the machine had actually been made by another company but bore the distributor's name. Failure to inform possible users that this could happen amounted to negligence, in the opinion of the court.[14]

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[13]Shandy v. Sombrero Ranches, Inc., 525 P.2d 487, Colo. 1974; Tarlowe v. Metro Ski Slopes, Inc., 271 N.E.2d 515, N.Y. 1971

[14]Dudley Sports Co. v. Schmitt, 279 N.E.2d 266, Ind. 1972

On the other hand, it is well settled that the manufacturer will not be held liable if the equipment is used in a way other than the one it was intended for. Also, the courts consistently rule that it is not up to the user to discover potential danger and guard against its existence . Under the law of warranty, the warranty is at least implied if not specifically expressed that 1) the product is marketable (that is, it is adequate to the use for which it is intended); and 2) it is safe if used in the manner for which it was intended.

Supervision of an activity. An injured party may claim that the sponsoring organization or one of its agents was negligent because supervision was inadequate. Ordinarily, the rule here is that if supervision in general is reasonable, the fact that an accident occurred will not automatically impose a penalty on the sponsoring organization. Unforeseen accidents do happen; the sponsor cannot be the insuror of all who come into contact with the activity. One can foresee only those events which the normal, average person of average intelligence might anticipate. Each case must therefore rest upon its own peculiar set of circumstances. It may be decided that the sponsoring organization is not liable, but that its individual agents, as individuals, may be held liable for negligence (this comes from the English law theory that every person must be responsible for his own errors or omissions.) Not only must sponsors foresee reasonable hazards, but must also warn those to whom they owe a duty to watch out. The standard of care will of course depend on such factors as the age, sex, size, and relative sophistication of the persons owed, but nothing should be taken for granted. Where, for example, the instructor tosses out a ball in the gym,

then disappears from the scene, lack of supervision might form the basis for a suit for damages. The rule is that if an instructor's presence might have prevented an accident, or injury, then his or her absence is the proximate cause of the injury. But it should be remembered that injuries occur while the instructor is present. Whether the instructor will be held liable for the injury depends on the time element and the instrumentality which causes the accident. Time elements are either instantaneous, or build up over time. Normally, instructors cannot be held liable for instantaneous accidents, such as to stop a pencil in the air, or a rock thrown by another student. Where, however, the scene builds up to a climax over time, and an injury occurs, the presence of the instructor might conceivably be thought to have reasonably prevented the accident. Here the teacher's absence would be the proximate cause of the injury.

Instrumentalities come in two kinds: innocuous and dangerous (weapons). Teachers should know there are inherent dangers in knives, guns, explosives, or other contraband and should move to stop an accident about to happen. Where however, the injury results from a pencil, a ball, a finger in the eye, it would be expecting to o much to expect the teacher to anticipate that these seemingly harmless objects might be the potential cause of an injury to someone under your care and supervision.

Absence of rules and regulations. Defendants look more composed in court where they can show that they have thought enough of players' safety to have promulgated rules and regulations to gain and maintain control of an activity. If given orally, these instructions may be adequate, but are much more convincing if written down. Given a combination of written rules

and regulations and a carefully monitored supervisory schedule, the chances of your surviving a tort liability complaint are greatly enhanced.

Condition of the premises. TIME Magazine for October 22, 1979 contains a story on medicine entitled The Slam Dunk Syndrome. It seems that some seven foot types had been injured while playing basketball in Portsmouth, Va. when their hands came into contact with a basketball rim with a sharp cutting edge. When the players dunked the basketball, they sustained injuries requiring stitches to close. This is what is meant by conditions of the premises causing injury to persons. Ordinarily, temporary conditions that may cause injury on or near school property do not constitute sure-fire grounds for liability. On the other hand, if these conditions become chronic, they amount to a "public nuisance" and may form the basis for a damage suit. A man who lived near a golf course was injured when a ball hit his windshield. Evidence showed that balls from the course frequently landed on the highway and had struck numerous vehicles on several occasions. The court ruled that the course and particularly the 13th tee of that course were "a public nuisance" and allowed for the man's recovery of damages.[15]

Treatment/lack of treatment. In the nature of things, when an injury occurs in a sports activity, it will ordinarily require medical treatment. The duty you owe to the injured party is to assure that competent medical assistance as soon as possible is made available, either through on-the-scene attention or via ambulance and hospital services. Both the quality of the treatment and its ready availability are important to meeting the

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[15]Castle v. St. Augustine's Links, 38 Times L. Rep. 615, 1922

legal requirement. Whether this has been adequately met is of course for the jury--whether you acted as the reasonably prudent person of ordinary intelligence would have acted under the circumstances. A case arising in California will illustrate. A football coach directed that an injured player be carried from the field by eight of his teammates without waiting for the arrival of a physician. Permanent injury resulted from this decision, and the coach was held liable.[16] Where, on the other hand, the injury does not appear to be serious, there may be no need to summon medical assistance so long as the wait does not aggravate the injury.[17] One should always lean toward the possibility that the injury may be more serious than it is at first indicated to be. Unless you or a member of your staff have had medical training, you should limit your own ministrations to first aid only, since to begin treatment which makes the injury worse may lead to awards sufficient to keep you a pauper for the rest of your natural life.[18]

Miscellaneous causes. Coaching negligence is among the miscellaneous causes often claimed in tort liability suits. The rule here is that the coach's duty is to minimize the possibility that the body contacts indigenous to sports may result in something more than slight injury. Ordinarily, the duty owed is adequately met by good coaching, and in providing adequate equipment and seeing that it is used in the manner prescribed for it. In this regard, the factors of physical conditioning, mental attitude, and morale of players are important considerations for the jury. Although players assume some risk in taking part

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[16]Welch v. Dunsmuir Jt. Union High School, 326 P.2d 633, Cal. 1958

[17]Pirkle v. Oakdale Union Grammar School Dist., 253 P.2d 1, Cal. 1953

[18]Bogabgab v. Orleans Parish School Bd., 239 So.2d 456, La. 1970; Guerreri v. Tyson, 24 A.2d 468, Pa. 1942

in sports, they do not assume all the risks involved because the risk is shared by those who represent the institution and by the institution itself.

Another miscellaneous cause of injury may be that of spectators who become excited by events on the field. They may throw bottles, bats, or other items or come into contact with the players themselves. If the identity of those who do this can be ascertained, then that spectator or spectators can be held liable. More difficult, however, is the instance where a single spectator may arouse the enmity of the crowd in such a way as to be guilty of creating a disturbance. In an instance where an umpire was roughed up by spectators following a baseball game, the umpire was able to collect damages from certain spectators, but not from the manager who had disputed some calls. To make managers liable, said the court, "would place an intolerable burden upon managers" who would then be held liable "for any action of an unstable person who might arrive at the game spoiling for a fight and become enraged over an umpire's call which the manager had protested."[19] If the premises are maintained in a safe condition, and security guards sufficient to the occasion are posted, the courts will consider such precautions in assessing damages against the host organization.

Defenses Against Claims for Damages

Finally, the bottom line: what defenses are available to the administrator when complaints are brought that you or one of your staff are negligent? The following are the most commonly employed defenses to save you and your coworkers harmless from tort liability claims.

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[19]Toone v. Adams, 137 N.E.2d 132, N.C. 1964

Unavoidable accident. If an injury has never happened before, you may argue that you could not anticipate it, therefore, there is no negligence since to foresee such an eventuality would amount to clairvoyance. The jury must then decide whether the average, prudent person with average intelligence would have anticipated and thus guarded against such an accident. Teachers and coaches have been held to the anticipation, for example, that waves along the Oregon coast might come up and inundate their students,[20] that spectators congregating on the sidelines might pose a danger to the players,[21] and that instructing players to ride home from practice with a known reckless driver in an old jalopy would pose a probability of injury to the player-riders.[22]

One need not be clairvoyant; average foresight will suffice to meet the duty owed. But that is where the jury must decide the issue at bar: whether you owed the plaintiff a duty, whether you breached the duty, and an injury flowed as a natural consequence of that breach of duty owed. In the initiation case cited earlier,[23] for example, the coach should have anticipated that where an electrical shock was administered to initiates, leading to electrocution of one of them, that there was a clear and present danger to the students, and have stopped the ceremony. Failure to do so rendered the coach liable in damages for the wrongful death of the deceased player.

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[20]Morris v. Douglas Co. School Dist., 403 P.2d 775, Ore. 1965

[21]Domino v. Mercurio, 234 N.Y.S.2d 1011, N.Y. 1962, aff'd., 193 N.E.2d 893, N.Y. 1963

[22]Hanson v. Reedley Jt. Union High School Dist., 43 Cal.App.2d 643, 111 P.2d 415, Cal. 1941

[23]DeGooyer v. Harkness, 13 N.W.2d 815, S. Dak. 1944

Contributory negligence. The second type of defense is that of contributory negligence, in which the injured party did something or failed to do something which brought injury to himself. One who unreasonably exposes himself to danger without complaint may not later complain that the defendant failed in his duty to protect the plaintiff. Because contributory negligence as a defense tended to cause hardship where the injured party's negligence is gross but the defentant's is slight, some states have enacted comparative negligence statutes, which provide that recovery will be determined by the relative negligence of the parties. Thus, if the actor's negligence is found to be twice that of the injured party's, the latter will recover only two-thirds of the damages thought appropriate by the court.

Assumption of risk. The third type of defense is based on the principle that one who goes out for a sport assumes a risk voluntarily, and cannot later complain that he was unaware of the risk involved. This is a major defense of phys ed departments, since those who voluntarily go out for an activity take the risks associated with that activity. Various mutations on this assumption are, first, that a player may consent to relieve others of liability through prior agreement, such as in the professional contract. Second, two parties may enter a relationship involving known risk; the player is assumed to realize the risk and impliedly relieves the other of responsibility for an injury except in extreme cases. A third example is where a person assumes a risk so outlandish as to render the party guilty of contributory negligence (the Evil Knievel syndrome), in which case recovery is barred both by assumption

of risk and the contributorynegligence principle. Remember, the player-participant assumes only the risks normally associated with that activity, and may find sufficient grounds on which to base a claim where the risk is enhanced by the conduct of the institution or its agent.

Immunity. The fourth and final defense is that of governmental or charitable immunity--the doctrine that because of the nature of the work you are doing, the institution is not subject to tort liability suits. Immunity as a defense is becoming a thing of the past, mainly because of two factors: 1) the presence on the scene of low-cost liability insurance; and 2) the idea that one who happens to be injured by negligence of a governmental or charitable institution should not have to bear the brunt of the injury alone. Thus, both public and private institutions are responsible for their own tortious acts. Even in the public sector, the distinction between a governmental and a proprietary function is becoming blurred, inasmuch as it is generally ruled by the courts that extra-curricular activities are now considered to be a normal part of the legitimate function of government. Only a handful of states still hold to the immunity doctrine, so you should check in your own jurisdiction as to whether immunity is possible as a defense in tort liability cases.

Keeping a Low Profile

The foregoing cases suggest that the most effective defense against liability in sports and recreational activities is to keep a low profile and hope for the best. Given an accident-free environment, a good staff who are aware of the dangers inherent in their work, good legal counsel, and adequate insurance coverage, you are in an excellent position to avoid needless litigation. The job you save may be your own.

REFERENCES

Alexander, Kern and Erwin Solomon, College and University Law, Charlottesville, Va.: The Michie Co., 1972

Alexander, Ruth and Kern Alexander, Teachers and Torts, Middletown, Ky.: Maxwell Pub. Co., 1972

Appenzeller, Herbert Athletics and the Law, Charlottesville, Va.: The Michie Co., 1975

Chambers, M. M. The Colleges and the Courts, Danville, Ill.: Interstate, 1972, Ch. 12 Torts Against Students

Hudgins, H. C., Jr. and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, Charlottesville, Va.: The Michie Co., 1979, Ch. 4 Tort Liability

Knaak, William C. School District Tort Liability in the 70's, St. Paul: Marric Pub. Co., 1969

Mancke, John B. Liability of School Districts for the Negligent Acts of their Employees, J of Law & Educ., Vol. 1, No. 1 Jan. 1972, pp. 109-127

Mohler, J. David and Edw. C. Bolmeier, Law of Extracurricular Activities in Secondary Schools, Cincinnati: W. H. Anderson Co., 1968

Nolte, M. Chester, Extraordinary Care Lessens Vulnerability, American School Board Journal, June, 1964, pp. 40-42

Nolte, M. Chester, What is Legally Adequate Playground Supervision? American School Board Journal, Feb. 1965, pp. 42-43

Van der Smissen, Betty, Legal Liability of Cities and Schools for Injuries in Recreation and Parks, Cincinnati: W. H. Anderson Co, 1968

Weistart, John C. and Cym H. Lowell, The Law of Sports, Indianapolis: Bobbs-Merrill Co., 1979, 1154 pages, $37.50 (Best source available)

Young, D. Parker, The Yearbook of Higher Education Law, 1977 and after, Topeka: National Organization on Legal Problems of Education, 1977 and annually since that date